OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

November 21, 2003

By Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325
Washington, DC 20554

RE: *Ex Parte* Presentation in a Non-Restricted Proceeding In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CG Dkt. No. 02-278)

Dear Ms. Dortch:

The Office of Advocacy, U.S. Small Business Administration ("Advocacy"), respectfully submits this letter to the Federal Communications Commission ("FCC" or "Commission") in the aforementioned proceeding.[1] Advocacy hosted a roundtable Monday, November 17, 2003, on the economic impacts of the fax advertising provisions in the FCC final order for the "Do-Not-Call" rules. Advocacy is filing this letter to supplement Advocacy's *ex parte* notice filed earlier this week.[2]

Commonly referred to as the "Do-Not-Fax" provisions, the Fax Advertising provisions potentially affect the use of fax communications by small entities and the membership organizations that represent them. The numbers of small entities, as well as the volume and nature of the fax communications affected by the rule, are the subject of much debate. As stated in our earlier filing, Advocacy held the roundtable to discuss (1) which small entities are affected by the rule, (2) the scope of the rule's impact on small entities, and (3) available alternatives that are less burdensome but still allow the FCC to accomplish its policy objectives.

1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305 to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for the receipt of complaints concerning the government's

[1] *In the Matter of* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order,* CG Dkt. No. 02-278, FCC 03-153 (rel. July 3, 2003) ("Final Rule" or "Order").

[2] *Notice of an Ex Parte Presentation* filed by the Office of Advocacy, U.S. Small Business Administration in CG 02-278 (Sept. 18, 2003). In accordance with FCC rules, Advocacy filed a notice of an *ex parte* meeting for its roundtable. In that notice, Advocacy stated that it would supplement the filing with a more complete summary of the discussion at the roundtable.

policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.[3] Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the Regulatory Flexibility Act ("RFA").[4]

Congress designed the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.[5] An objective of the RFA is for agencies to be aware of the economic structure of the entities they regulate and the effect their regulations may have on small entities. To this end, the RFA requires agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small businesses.[6] The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical requirement for determining how public issues can best be resolved without erecting barriers to competition. To this end, the RFA requires the agencies to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing burdens on small entities.[7]

On August 13, 2002, President George W. Bush signed Executive Order 13272 that requires federal agencies to implement policies protecting small entities when writing new rules and regulations.[8] This Executive Order highlights the President's goal of giving "small business owners a voice in the complex and confusing federal regulatory process"[9] by directing agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities.

2. Small Entities Affected by the Fax Advertising Provisions

The first issue addressed by the roundtable was identifying which small entities are affected by the FCC's Fax Advertising provisions. The rule prohibits the use of any facsimile machine, computer, or other device to send an unsolicited advertisement.[10] The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.[11]

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[3] 15 U.S.C. § 634(c)(1)-(4).
[4] Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).
[5] 5 U.S.C. § 601(4)-(5).
[6] *See generally*, Office of Advocacy, U.S. Small Business Administration, *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act* (2003).
[7] 5 U.S.C. § 604.
[8] Exec. Order. No. 13272 § 1, 67 Fed. Reg. 53,461 (2002).
[9] White House Home Page, *President Bush's Small Business Agenda*, (announced March 19, 2002) (last viewed August 22, 2003) <http://www.whitehouse.gov/infocus/smallbusiness/regulatory.html>
[10] Order, para. 185.
[11] 47 U.S.C. § 227.

The roundtable participants stated that such a broad brush definition captures almost every small business in the country, and many industry representatives argued that their entire industry segment was covered by the rule. The National Automobile Dealers Association ("NADA"), for example, suggested that the 20,000 to 30,000 automobile dealers would be subject to the rule. The National Association of Wholesaler-Distributors ("NAW") said their 40,000 members would be affected. The National Association of Realtors ("NAR") said that their 980,000 members would be affected. The Associated Builders and Contractors ("ABC") stated that their 23,000 member companies would all be affected.[12] The U.S. Chamber of Commerce stated that this rule would affect every small business in the country, particularly home-based businesses.

3. Scope of the Economic Impact on Small Entities

The impacts of the proposed rule were discussed at length from the point of view of both small entities and trade associations representing small entities. Based on the understanding that the Established Business Relationship ("EBR") would be eliminated, the consensus was that such a step would be disastrous from a variety of reasons. A small survey from NAW revealed that its membership expected to pay an average of $22,500 to obtain consent forms and an average of $20,000 for annual compliance. It is worth noting that these preliminary results were based on a membership that sent faxes to 6,912 recipients at an average of 9,034 locations.[13]

To all who were present at the roundtable, the impacts were pervasive and did not differentiate between occupation and industry. The impacts are pervasive because of the established business relationship between wholesalers and retailers; between distributors and wholesalers; between manufacturers and distributors; between realtors and prospective clients; between lenders and borrowers. All are currently based on fax communications. Within such realm, transactions are conducted, and information about products and services are introduced. It is clear that in the conduct of everyday business, advertisements and transactional documents are transmitted to facilitate the conduct of current and future transactions. Electronic mail has not yet become as widespread as the telephone line. A fax machine hooks into a phone line, and functions just as a phone; it is the most expedient medium of communication business to business, and business to customer. The fax line is a lifeline for information and contracts to flow, so that goods and services circulate from point A to point B.

The participants also raised specific issues that would add to the costs of compliance with the Fax Advertising provisions. Several participants raised training as a key expense. Customer

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[12] Associated Builders and Contractors did not have a representative present at the roundtable but sent information independently to Advocacy.

[13] In their Petition for Reconsideration, NAW, the U.S. Chamber of Commerce, and other entities attached discussions of the joint petitioners addressing the impact on their organizations and their members. *Petition for Reconsideration* filed by the Chamber of Commerce of the United States, the Associated General Contractors of America, the Community Associations Institute, the Credit Union National Association, the National Association of Manufacturers, the National Association of Wholesaler-Distributors, the National Grocers Association, the National Restaurant Association, and the National Federation of Independent Businesses, in CG 02-278 (August 25, 2003). NAW supplemented this filing with more comments on the impact on its membership. *Reply to Opposition to Petition for Reconsideration filed by the Office of Advocacy, U.S. Small Business Administration* filed by the National Association of Wholesaler-Distributors in CG 02-278 (Oct. 27, 2003). These filings contain useful data on how small entities are impacted by the rule, and the FCC should consider them in conjunction with the information presented here.

service representatives and other employees must be trained in what can be faxed and what cannot be faxed under the requirements of the rule. The constant turnover in the labor force means that the training is an on-going annual cost. Also, participants said that multiple contacts will be needed to get signatures providing consent, which increases the amount of time needed to comply with the rule. Since the rule requires permission for each fax machine, recipients that move around a lot will require a new signature at each location, which adds to the compliance burden.

Several participants raised the issue that members of the public are hesitant to sign anything because concerns that their signature could be construed as a contract. Because the public is nervous of being defrauded, obtaining signed, written permission may not be easy to acquire. Also, this could create a barrier to new businesses or small businesses seeking new customers. Participants stated that the rules would apply to non-profit as well as for-profit entities, since there is no exception in the rule.[14] If a non-profit sent "any material advertising the commercial availability or quality of any property, goods, or services," they would be required to get signed, written permission just as any other business or entity governed by the rule.

4. Possible Alternatives to Minimize Burdens on Small Entities

The participants concluded that a few alternatives could safeguard the use of facsimile devices as a viable form of communication accomplishing the agency's regulatory objectives of protecting consumer privacy and resources. The roundtable participants and the small businesses and entities they represent felt there was a significant difference between entites who used faxes as part of their communications with business partners and "junk faxers" who send unsolicited faxes.

The participants suggested many alternatives that the FCC should consider that would help minimize the impact on small businesses. The suggested alternatives are listed below:

- The FCC should restore the EBR exemption and crack down on "junk faxers" by enforcing existing rules. Regardless of an EBR exemption, if the recipient advises the sender to stop sending faxes through an opt-out clause, that request must be honored and is enforceable under the FCC rules.
- The FCC should eliminate the requirement that consent is needed for each fax machine. Instead, the FCC should make permission entity-based so that a single permission is needed per entity.
- The FCC should allow oral permission or requests to satisfy the requirements for prior consent and permit fax on demand from a direct solicitation from a customer or other business partner.
- The FCC should permit membership in an organization to qualify as consent to receive

[14] In his Opposition to Advocacy's Petition for Reconsideration, Mr. Walter Oney states that the Commission is not changing its rules in regard to non-profit organizations and cites to paragraph 128 of the Order. This paragraph deals with the Do-Not-Call rules and does not apply to fax communications. *Opposition to Petition for Reconsideration filed by the Office of Advocacy, U.S. Small Business Administration* filed by Walter Oney in CG 02-278 (Sept. 5, 2003). The FCC did clarify its rules concerning fax communications and membership in trade associations in paragraphs 192-3 of the Order.

faxes from the organization.

- The FCC should clarify its definitions and more narrowly define what is covered in the rule. The vagueness of the current rule is causing a great deal of concern.

5. Conclusion

Advocacy hopes that this information is helpful to the FCC as it reconsiders the Fax Advertising portions of the Do-Not-Call rule. Advocacy will continue to assist the FCC in its efforts to collect impact information and craft a rule that accomplishes the Commission's policy objectives and is not unfairly burdensome to small businesses. If any additional information becomes available to Advocacy, we will forward it to the FCC for its consideration.

Thank you for your consideration of these matters, and please do not hesitate to contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov if you have questions, comments, or concerns.

Sincerely,

/s/ ______________________
Thomas M. Sullivan
Chief Counsel for Advocacy

/s/ ______________________
Eric E. Menge
Assistant Chief Counsel for Telecommunications

/s/ ______________________
Radwan Saade
Regulatory Economist

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U.S. Small Business Administration
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202-205-6533

Attachments: Participant List for Fax Advertising Roundtable November 17, 2003
NAW's Memo Summarizing its Fax Survey Data

cc: Erica McMahon, Consumer and Governmental Affairs Bureau
Helen Hillegass, Consumer and Governmental Affairs Bureau
Carolyn A. Fleming, Office of Communications Business Opportunities

Advocacy Fax Advertising Roundtable
November 17, 2003
Participants

Air-Conditioning Contractors of America -- Chris Brown
American Express and its Small Business Franchisees -- Antonella Pianalto
American Society of Association Executives -- Chris Merida
American Society of Travel Agents -- Barbara O'Hara and Burton Rubin
Credit Union National Association -- Catherine Orr and Mary Dunn
Halprin, Temple, Goodman & Maher -- Joel Bernstein
IH Counsel -- Taylor Monfort
International Foodservice Distributors Association -- Jonathan Eisen
Mortgage Brokers Association -- Rod Alba
National Association of Realtors -- Mary Antoun, Jeanne Delgado, Iona Harrison, and Lynn King
National Association of Wholesaler-Distributors -- Jade West
National Association of Women Business Owners -- Amanda Perl
National Automobile Dealers Association -- Paul Metrey
National Federation of Independent Business -- Lara Chamberlain and Andrew Langer
National Grocers Association -- Tom Wenning
National Newspaper Association -- Jeff Carson and Tonon Rush
Senate Committee on Small Business and Entrepreneurship, Majority Staff -- Marc Freedman
Senate Committee on Small Business and Entrepreneurship, Democratic Staff -- Nigel Stephens
U.S. Chamber of Commerce -- Giovanni Coratolo and Michael Zaneis
Washington Policy Associates -- Melissa Moskal
Wiley, Rein & Fielding -- John Kamp
Yellow Page Integrated Media Association -- Amy Healy

N•A•W

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Memorandum

TO: **Eric Menge, Assistant Chief Counsel for Telecommunications**
Office of Advocacy, U.S. Small Business Administration

FROM: **Jade West, Sr. Vice President-Government Relations**
National Association of Wholesaler-Distributors

DATE: **November 17, 2003**

RE: **Cost to Small Business of Compliance with FCC Proposed Ban on "Unsolicited Advertising" Faxes**

In preparation for the November 17th, 2003 Office of Advocacy Roundtable discussion of the "do not fax" regulations, we initiated an internet-based survey of small business members of NAW. The survey was sent out to 550 individuals (representing about 265 companies) late in the day on November 6th, and by the close of business November 13th we had received 212 responses. That is a response rate of almost 40 percent in only one week – an indication of how serious this issue is to our small business members.

All of the respondents had annual sales volume of less than $20 million. 72% had sales of under $15 million, and 39% were under $5 million. Almost a quarter of the respondents reported having ten or fewer employees.

Use of the fax in daily business:

The respondents use faxes to communicate with both vendors and customers, and it is clear that use of the fax is an integral, vital part of their everyday business operations. While clearly not all uses of the fax would be prohibited, it would be virtually impossible for small businesses to ensure that all employees sending faxes accurately distinguish the permissible uses from those that would be forbidden. Among the common uses of the fax cited again and again by respondents:

Purchase orders, copies of orders, order acknowledgements and confirmations
Price quotations, pricing changes, special offers, confirmation of verbal quote
Invoices and copies of invoices
Product information and specifications (esp. to buyers without internet access)
Drawings and artwork proofs
Sales tax exemptions

Credit applications and inquiries
Terms of sale changes
Notification of upcoming classes, seminars, open houses, training programs
Material Safety Data Sheets and other safety information
EPA certifications
Warranty information and product announcements
Recall notices and repair bulletins
Shipping and tracking information

Cost of compliance with proposed FCC regulations:

We asked the respondents how much it would cost them *initially* to obtain written consent from all of the customers and vendors with whom they currently communicate by fax, and how much it would cost on an *annual basis* for them to maintain the records necessary to remain in compliance if the definition of established business relationship were changed to the 18-month and 3-month periods proposed by the FCC.

The estimated cost of obtaining initial consent from established customers and vendors ranged from as little as under a hundred dollars to well over $100,000. Discarding verbal rather than numeric responses (and one that seemed too high to be realistic), the total cost for the remaining respondents combined was $3,929,435. This is an average cost of $22,454, and a median cost of $5,500.

The responses, similarly adjusted, for the estimated annual cost of compliance totaled $3,235,057, producing an average annual cost of $20,346 and a median cost of $10,000.

Many of those who provided verbal rather than numeric estimates described the likely cost as prohibitive, substantial, expensive, very high, outrageous, way too much, more than we can afford, neither cheap nor easy. One said he didn't want to know, and several indicated that they did not believe they could comply.

Economic impact of compliance

Wholesaler-distributors typically average a profit of 2% on sales. Thus, by multiplying the costs of compliance with the FCC's proposed fax regulations by 50, the amount of annual sales necessary to cover these estimated costs can be determined. The following table shows the total of estimated costs, initial and annual, and the new sales that just this small sample of small businesses would have to generate to cover those estimated costs.

	Initial cost of compliance	**Annual compliance cost**
Total of estimated costs	$ 3,929,435	$ 3,235,057
New sales required to cover costs	$ 196,471,750	$ 161,752,850